

1997

# The State of Utah v. Jeffrey Earl South, Dianna South : Reply to Brief in Opposition

Utah Court of Appeals

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BRIEF

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DOCKET NO. 970174

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IN THE SUPREME COURT OF THE STATE OF UTAH  
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THE STATE OF UTAH,	*	BRIEF REPLY TO OPPOSITION OF
Plaintiff and Respondents,	*	PETITION FOR WRIT OF CERTIORARI
vs.	*	TO THE UTAH COURT OF APPEALS
JEFFREY EARL SOUTH,	*	
DIANNA SOUTH,	*	Sup. Ct. No. 970174
Defendants and Petitioners.	*	Ct. Of Appeals No. 930362-CA
	*	Trial Ct. No. 921000162
	*	Priority No. 12

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**FILED**

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UTAH

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### STATE CASES

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### FEDERAL CASES

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Steele v. United States, 267 U.S. 498 (1925)

## CONSTITUTIONAL PROVISIONS

### Constitution of Utah Article I section 14:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

### Federal Constitution Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

## STATUTES AND RULES

Utah R.App.P.46. Considerations governing review of certiorari.

UCA ss 77-23-1 (1982)

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**OPINION FOR REVIEW**

State v. South, 932 P.2d 622 (Utah App. 1997)

**QUESTION PRESENTED FOR REVIEW**

Did the Court of Appeals error in reversing the trial court's finding that the search warrant was fatally defective on its face? This decision establishes a Utah case precedent allowing the scope of a "persons" search warrant to be expanded retrospectively to include the entire home by mere reference to the probable cause application affidavit which did not accompany the search warrant at the time of execution and was unavailable for supporting review at that time.

**STATEMENT OF CASE**

1. No police report of a stolen phone.
2. Simonson prepared probable cause affidavit which still has not been examined for veracity or reliability.
3. Simonson proofread the search warrant commanding search of "persons."
4. Judge Burton Harris signed warrant authorizing search of "persons."
5. South residence was searched by at least five officers, exceeding the scope of the warrant which was the sole document executed and available for review.
6. Judge Harris ruled that the warrant was fatally defective on its face, but proceeded on the independent probable cause of plain smell. Thus the supporting affidavit was never examined by the courts.

## ARGUMENT

This case does merit certiori review because no existing case law has established whether the constitutional warrant particularity requirement can be superseded by documents which do not accompany the warrant at the time of intrusion into the citizens home and are not available for review when requested at the time of the search.

This case presents significant legal issues that will have broad applications in forthcoming cases regarding the application of constitutional law, the law of search and seizure, and rights to privacy particularly within the home.

The defense contends that the Court of Appeals decision validating the search warrant does conflict with prevailing case law and that the case law relied upon was misinterpreted.

The search warrant authorizes a search of the "persons" not an entire residence. The residence search was executed with the search warrant authorizing "persons" standing alone. The "attached" affidavit requested at the time was unavailable for review and therefore could not be of assistance to the officers in ascertaining the area to be searched. Description in a search warrant is sufficient, if an officer with warrant can with reasonable effort ascertain and identify the place intended. Steele v. United States. Reasonable effort to determine the place to be searched may include a review of the supporting affidavit. State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985) In Anderson the warrant was sufficiently broad on its face and was accompanied by the supporting affidavit. Id. Similarly, in State v. Kelly, 718 P.2d 385, 392 (Utah 1986) a warrant with an incorrect street address was cured by the attached affidavit as

well as other related warrants with corresponding affidavits containing the correct address. Similarly, in the case of State v. McIntire 768 P.2d 970 (Utah App. 1989) the search warrant was accompanied by the affidavit.

The prosecution contends that the warrant should be validated and its scope expanded in retrospect because the probable cause affidavit is mentioned in the warrant and thus is incorporated therein. They want the courts to hold that the affidavit is incorporated in the warrant by a mere reference. Case in point, "there is probable cause for issuance of a search warrant, as more fully set forth in the affidavit, a copy of which is attached hereto and incorporated herewith."

However, a copy of the "attached" affidavit did not accompany the search warrant at the time of execution and when requested it was unavailable and therefore could not be referenced by the executing officers.

Nor could the citizens confirm that the police were within their legitimate scope of authority to ransack the dwelling. The failure to have the affidavit available, together with the warrant, for the edification of the homeowner is a fatal defect. "The requirement that the affidavit be attached to or inserted in the warrant is not a mere formality. It makes the affidavit of probable cause immediately available to the person whose premises are entered, and explains to him at the onset the reason for the intrusion on his privacy." Moore v. United States, 461 F.2d 1236 (D.C.Cir. 1972)

The prosecution further asserts that it was a "clerical" error which resulted in omission of the residence as the target of the search. Simonson gathered information, prepared the probable cause affidavit, aided in preparation of the search warrant and under oath testified that he had proofread the search warrant prior to submitting both documents to the magistrate for authorization. This hardly constitutes a clerical error.

This probable cause affidavit was signed by the magistrate. But it is presumptuous for the prosecution to assume he therefore authorized a search of the home simply because the affiant described the home where he had questioned defendant Jeff South.

Rather he signed a search warrant authorizing a "persons" search, and it is logical that the request to cross the threshold and search the premises was either denied or never considered by the magistrate. This argument is further supported by the fact that the same magistrate ruled that the search warrant was fatally defective for a search of the home.

There was no probable cause established for a search of the residence, nor any independent probable cause for the search of defendant, Dianna South.

Furthermore, this affidavit has never been examined by the courts. It is full of misstatement and falsification of fact, unreliable and unverified information.

To allow any one affiant who prepares an affidavit to expand the scope of his search warrant by inclusion of a passing reference to the affidavit is to erode the governmental

separation of powers. Administrative officers endowed with this judicial privilege of authorizing their intrusion based on retrospect is indeed a formidable threat to our jealously guarded rights of privacy and freedom. Following this case precedent other overzealous officers may be invited to ignore these freedoms when their illegal searches and sloppy paperwork are sanctioned by the courts.

The defense contends that the warrant does not satisfy the particularity requirement guaranteed by both the Federal and the Utah constitutions, and cannot be corrected through hindsight. A search warrant is required to describe "with particularity the thing, place or person to be searched." UCA ss 77-23-1 (1982)

#### **CONCLUSION**

Police established probable cause and obtained authorization to search defendants' "persons." The affidavit was not present at the time of the search and therefore cannot be relied on to expand the scope of the warrant according to existing case law. Therefore under Utah law the search executed was "unreasonable" and invalid, exceeding the scope of the search warrant with blatant disregard for the constitutional particularity requirement. The trial court properly ruled that the search warrant was "fatally defective on the face."

Review of the Court of Appeals opinion will significantly affect development of Utah case law and the application of constitutional law.

THEREFORE, the defense respectfully requests this Court to issue the Writ of Certiorari.

DATED this 12 day of June, 1997

Dianna South

DIANNA SOUTH

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing document was deposited in the United States mail to the parties listed below:

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Dianna South